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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 SCOTT ALAN FREEBURG,

10 Petitioner,

Case No. C12-376-JLR-BAT

11 v.

12 DONALD HOLBROOK,

13 Respondent.

14 **REPORT AND**
15 **RECOMMENDATION**

16 Respondent moves to stay and abey this federal habeas proceeding (Dkt. 14) because
17 petitioner filed a pending state collateral attack contemporaneously with his 28 U.S.C. § 2254
18 habeas petition, the state collateral attack may exhaust certain issues or moot the federal petition,
19 and relevant state-court records cannot be retrieved while the state collateral attack is pending.

20 Petitioner has not filed an opposition.

21 Earlier, the Court granted respondent a second extension of time to file an Answer but
22 noted that it was not inclined to grant a third without information from the parties about whether
23 this matter should be stayed, dismissed without prejudice based on the pending state proceeding,
 or evaluated on the merits. (Dkt. 13.) The Court now finds good cause to stay this matter while
 petitioner exhausts his state-court remedies. In his petition, petitioner notes that he has filed a
 number of successful and unsuccessful attacks on his 2002 conviction, which raises the

1 possibility that he filed his federal action as a “protective petition” so that he would not run afoul
2 of the federal statute of limitations should his most recent state collateral attack be dismissed.
3 See *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005); see also 28 U.S.C. § 2244(d)(1)(A); cf.
4 *Smith v. Ratelle*, 323 F.3d 813 (9th Cir. 2003) (holding that the district court abused its discretion
5 by summarily dismissing a mixed habeas petition because the one-year statute of limitations
6 affected petitioner’s ability to raise his fully exhausted claims at a later date).

7 The Court recommends **GRANTING** respondent’s unopposed motion to stay and abey
8 this proceeding until 30 days after the issuance of the certificate of finality in the state-court
9 proceeding. (Dkt. 14.) The parties should be required each to file a status report with the
10 undersigned magistrate judge **120 days** after the Order adopting this Report and
11 Recommendation, and then every **120 days** thereafter. Respondent’s Answer should be filed
12 within 45 days after the stay is lifted.

13 Because respondent’s motion to stay is unopposed, this Report and Recommendation
14 may be considered and adopted by the District Judge immediately. A proposed Order is
15 attached.

16 DATED this 19th day of July, 2012.

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19 BRIAN A. TSUCHIDA
20 United States Magistrate Judge
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